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# The First 10 Years of the Lay Judge System: Now, Do We Have "Hope" for Criminal Trials in Japan?*

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## Introduction

One of the most distinguished professors of criminal procedure in Japan, Prof. Ryuichi Hirano, declared in 1985 that criminal trials in Japan were quite hopeless. Among his criticisms: criminal trials are just the place to receive the evidences, and legal professionals including judges think the courts not as the place to find the truth but the place to confirm the written statements.[1] And, Prof. Hirano continued, we won't be able to repair the Japanese Criminal Procedure unless we implement the Jury System or layman participation trials system (such that in Italy and northern European countries have).

In May 2009, Japan introduced the Lay Judge System, which means now we have solid lay participation system in criminal trials. This paper, therefore, aims to find out whether we can now reply to Prof. Hirano's comments: "Yes, now we have hope!"; or should we say, "No, our criminal justice system is still in a dark, hopeless stage"? In doing so, I will review the first 10 years of the Lay Judge System, and how this system has impacted the Criminal Justice System in Japan. There are many missing pieces, so I will discuss the remaining issues for the Lay Judge System. Also, I would like to propose some future changes to improve the Lay Judge System.

* This article is based on the paper I presented at the Public and Victims Participation in Criminal Justice System in Japan: A Tenth Anniversary Symposium, which was held at UC Hastings, College of the Law on September 20, 2019. I would like to extend my sincere gratitude to Professor Setsuo Miyazawa for giving me such a great opportunity.

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1. Ryuichi Hirano, *Genko Keji Sosyou Ho no Shindan* [*Diagnosis on Current Criminal Procedure*] *in* DANDO SHIGEMITSU SENSEI KOKI KINEN RONBUN SHU Vol. 4 [The Festschrift for Celebrating 70th Birthday] (1985 Yuhikaku Publication), pp.418, 422-423.

## Copernican Changes of the Criminal Justice System in Japan in the Late 1990s – Introduction of the Lay Judge System

Since late 1990s there have been many changes in Criminal Justice in Japan. I think there are two main factors behind that: One is the increasing awareness for victims which have resulted in more victim input in criminal procedure, and the ultimate creation of the Victims Participation System (for more information on this system, please see the paper by Shigenori Matsui, "Victim Participation in the Criminal Process in Japan," in this issue). And the second factor is lay participation. This resulted in the Lay Judge System and also the mandatory prosecution power[2] for the Prosecution Review Commissions[3] (for more information on this system, please see the paper by Carl Goodman, "The Prosecution Review Commission Process – Historical Analysis and Some Suggestions for Change," in this issue). My paper will focus on the Lay Judge System.

In July 1999, the Justice System Reform Council (司法制度改革審議会: hereinafter the JSRC) was established under the Cabinet, for the purposes of "clarifying the role to be played by justice in Japanese society in the 21st century and examining and deliberating fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system" (Article 2, Paragraph 1 of the Law concerning Establishment of the Justice System Reform Council).[4]

The JSRC had held more than 60 meetings in two years, and they issued the final report, *Shiho Seido Kaikaku Shingikai Ikensyo - 21 Seiki no Nihon wo Sasaeru Sihou Seido* [*Recommendations of the Justice System Reform*

2. PRC itself was introduced in 1948, under the advisement of the GHQ. The U.S. government wanted Japan to introduce either the public election system of prosecutors or the grand jury system. The Japanese government didn't like either idea. Instead they introduced the PRC, jury advisory system to push prosecutors to reconsider their original decisions to indict cases or not. PRC didn't have any mandatory power for a long time. But under the Justice System Reform (司法制度改革) which operated since late 1990s, it was decided to introduce not only solid lay participation in criminal trials (the Lay Judge System) but also in prosecutorial decision (the PRC).

3. David Johnson & Mari Hirayama, *Japan's Reformed Prosecution Review Commission: Changes, Challenges and Lessons*, ASIAN JOURNAL OF CRIMINOLOGY.

4. The JSRC consisted of 13 people. The members were law professors, a professor of commerce, a board member of the University, lawyers, an ex-judge, an ex-prosecutor, company executives, and a representative of the House Wife Federation. *See* https://www.kantei.go.jp/jp/sihouseido/report/ikensyo/meibo.html.

*Council – For a Justice System to Support Japan in the 21st Century*][5] (hereinafter the *Final Report*). In the *Final Report,* under the Chapter IV. Establishment of the Popular Base of the Justice System, the JSRC advised introducing a new system where lay people can cooperate with professional judges, and participate substantively in decision-making in criminal trials. The JSRC modelled lay participation in criminal trials on that in other countries, such as the Jury System in the U.S., UK, and so on, and the lay assessors system in German, Northern European Countries, and so on.

Then, in November of 2001, Judicial System Reform Promotion Law (司法制度改革推進法) was established. In December of that year, Judicial System Reform Promotion Headquarters (司法制度改革推進本部, JSRPH) was established under the Cabinet. After the Final Report was published, the government conducted many hearings to collect opinions from various organizations, the Supreme Court, the Ministry of Justice, the National Police Agency, the Japan Federation of Bar Associations, Law Professors, and so on. The government also conducted Public Hearings through the internet, newspapers, and other media, to gather opinions from the public. Then, after the dissemination of the Final Report, the Japanese government decided to introduce its very own lay participation system, namely the Lay Judge System (as for the comparison of Lay Judge System with other types of lay participation, please see Table 1 below). On March 2004, the draft of "the Act on Criminal Trials with the Participation of Saiban-in" (裁判員の参加する刑事裁判に関する法律案) was submitted to the House of Representatives, and on May 28th of the same year, the Act on Criminal Trials with the Participation of Saiban-in (裁判員の参加する刑事裁判に関する法律; hereinafter, the Saiban-in Act) was legislated.[6] The Saiban-in Act was enacted on May 21, 2009.[7]

Let me briefly looking back at the time of the introduction of the Lay Judge System along with my own life course as a legal scholar. When I was an undergraduate student of law, back in 1990, there was no active Lay Judge System. Japan once had such a jury system from 1928-1943, but it was placed under a moratorium,[8] meaning the Jury System was still alive even

5. *See* https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html.

6. As for the process of legislation, please see Tsuji Hiroyuki *Hou An Teisyutsu ni Itaru Keii to Hou An no Gaiyo* [*The Process of Submitting the Draft and the Summary of the Draft*] JURIST No. 1268 (1984) p. 49.

7. As for the English translation of the Saiban-in Act, see http://www.japaneselawtranslation.go.jp/law/detail/?id=2772&vm=04&re=01.

8. As for the Jury System operated until the Second World War, and activists' movement to reinstall the system, see Takeshi Nishimura "Keiji Baishin Saiban, 200X nen, Nihon de – [Keiji

then in the 1990s, but the system was had been suspended. Therefore, the jury system was something to be seen only in American movies or TV dramas. The jury system seemed too much dramatic to many Japanese, and I was one of them.

But then, just as I became a graduate student of law in late 1990s, the Judicial System Reform started, and the government decided to introduce lay participation. That was quite surprising news. What was different with the lay participation in Japan compared to other countries, lay participation was introduced not simply to democratize justice in the nation, rather the government thought lay participation was a good way to allow ordinary citizens to participate in the justice system and would encourage their trust in the justice system—which is actually stated in the first article of the Saiban-in Act.[9]

Then, at the time I joined a law faculty in 2005, more and more people were going to the courthouse to observe criminal trials.[10] This was a big and clear change. It seemed the general public had realized they could be selected to serve lay judges at some point in the future. Also legal communities (court, prosecution and lawyers) had started to change the manners and protocols in the conduct of criminal trials. What they started to understand was that trials must be easy to understand.[11] For example, legal professionals should refrain from legal jargon and overly technical language as much as possible. The courts also had to become welcoming to ordinary people who came to the courthouse to observe trials.

And when it came to several years before the launch of the Lay Judge System, many opinions and debates were held in the various media. The public at the time didn't welcome the lay participation, and many surveys showed the reluctance among the public.[12]

Baishin Ho Kaisei Tougi Youkou] (1996 nen 5 gatsu Kaitei) ni Yoru [*Criminal Jury Trial, 200X in Japan – The Guideline for the Debate to Amend Criminal Jury Trial Act*] (revised May 1996), Jiyu to Seigi (LIBERTY AND JUSTICE), Vol. 48 No. 4 , pp 92-101.

9. The Saiban-in Act, Article 1 states, the Lay Judge System is introduced, "with the view that the involvement of saiban-in appointed from among the citizens in criminal procedures alongside judges helps to promote the citizens' understanding of and enhance trust in the judicial system."

10. Asashi Shimbun, May 3, 2006, at A3 reported that the number of the people who had visited the Osaka District Court to observe the trials was 753 in 2003, but it increased to 3,540 in 2005. Also, the article mentioned that when the Public Relation Division of the Osaka High Court operated the survey with these observes during December 2004-October 2005, 82% of them answered that the procedure of the trials they observed was "very easy to understand" or "easy to understand" while 17% answered "very difficult to understand" or " hardy understood" (N=1,750).

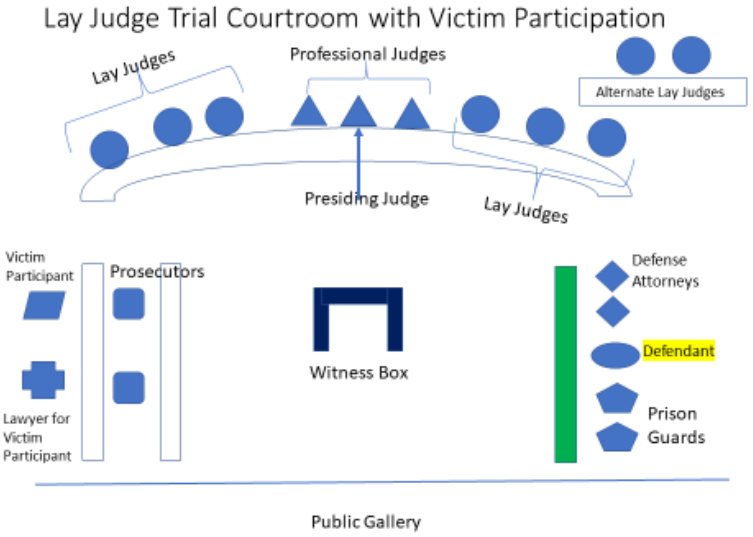
11. The Motto of the Lay Judge System has been, "Mite, Kiite Wakariyasui Saiban" [Criminal trials which are easy to observe, listen and understand].

12. In February 2005, 4 years before the implementation, the Cabinet Office took the survey among 3,000 citizens (valid answers were 2,077) and asked about their knowledge and opinions

## Basic Factors of the Lay Judge System

Figure 1 shows a diagram of the courtroom of the lay judge trials:

**Figure 1**




In a lay judge trial, there are 3 professional judges (one of them, seated in the middle, is a presiding judge) and 6 lay judges. It is a mixed panel, and they hear and deliberate a case together. They decide fact finding, which laws to apply a case, and also sentencing (The Lay Jude Act Article 6-(1)). The lay people also participate in deciding sentence, which is different from the jury system in the U.S. Table 1 shows some comparisons among the U.S. Jury System, the Lay Judge System and the Schöffen System Lay Assessor System of Germany.[13]

for the new system. When they asked "It is your duty to serve as a lay judge when you are selected. Do you want to participate in a criminal trial?"; 34.9% of them answered "rather not to participate" and 35.1% answered "do not want to participate," which meant 70% of the respondents were reluctant to participate as lay judges. *See* Public Survey on the Lay Judge System by the Cabinet Office (2005). https://survey.gov-online.go.jp/h16/h16-saiban/index.html.

13. As for the Schoffen Gericht System in Germany, I refer to the article by Philipp Schmidt & Mutsumi Kurosawa, *Doitsu no Sanshin Seido to Nihon no Saiban-in Seid- Keiji Tetsu Duki ni Okeru Shimin Sanka ni Kansuru Hikakuho teki Ichi Kosatsu* [*A Comparative Law Study on Lay Participation in Criminal Procedure*] HORITSU RONSO (MEIJI UNIVERSITY), Vo. 90 No. 4 & 5 (2018) pp.239-303.

**Table 1: Comparison of Three Lay participation Systems in Criminal Trials**

| Style | The Lay Judge System (Japan) | The Jury System (U.S.) | Schöffen System (Germany) |
|---|---|---|---|
| Targeted Cases | Applied only for Criminal Cases (Very Serious Crime Cases: 1.5% to 2.0% of all criminal trials) | Applied both for Civil Cases and Criminal Cases | Applied for Criminal, Labor Law, Administrative Law and Social Welfare Cases |
| Who become the lay participants | Randomly selected from voters' list, 20 years and older, case based. | Randomly selected from voters list etc., 18 and older. | 25 years and older, recommended by political party, 5 years term. |
| How a panel is composed? | Lay Judges (6) and Professional Judges (3)Deliberate Together (Mixed panel) | Jurors (12) Deliberate Cases. (no Judges' Participation) | Lay Assessors (2) and Professional Judges (3) in District Courts; L (2) and J (1) in Local Courts |
| Their authority (what to decide) | Mixed Panel decide Fact-findings, which laws they should apply, and Sentencing. | Jurors Decide Only Fact-findings ( Guilty or Not Guilty) | Mixed Panel decide Fact-findings and Sentencing. |
| Rule for a verdict and decision | Majority (= 5/9) is enough (it must include at least one professional judge), even in death penalty cases. | Verdict must be unanimous in criminal cases (some exceptions in some states, but no exception in Death Penalty Cases) | More than 2/3 is required for guilty verdict. (death penalty system is abolished in German in ) |
| Defendants can choose? | Defendants have no Choice | Defendants can choose either Jury Trials or Bench Trials. | Defendants have no choice |
| Confidential Agreements? | Gag-Order for Lifetime, punishable with 6 months or less imprisonment OR fine of 500,000 yen or less. | No Gag-Order after Verdicts | Gag-Order even after verdict/sentencing. |
| Can restrict Media Coverage? | No restraining order against the media. | No restraining order against the media. | No restraining order against the media. |

The Lay Judge System concerns itself only with serious crimes, which carry death penalty or indefinite sentence, or with intentional crimes resulting death (Saiban-in Act Article 2 (1)). Table 2 shows the list of the crimes tried by Lay Judge Trials. As you can see, the Lay Judge Trials consider very serious cases only, which is about 1.5% of all criminal trials.

**Table 2: Crime Tried by the Lay Judge Trials: May 21, 2009-Dec. 31, 2019**

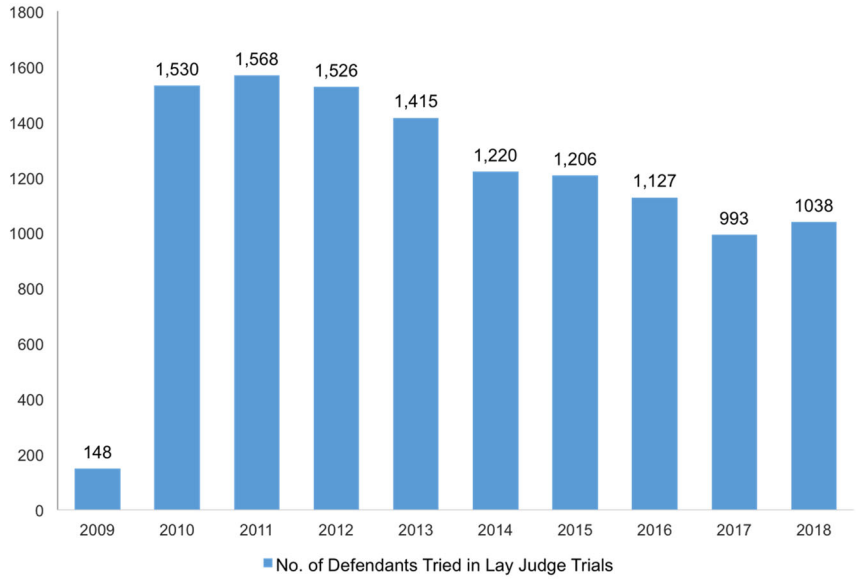
| **Total** | **14,849** |
|---|---|
| Robbery Causing Injury | 3,436 |
| Homicide | 3,250 |
| Arson of Inhabited Building | 1,455 |
| Methamphetamines (Import for Profit) | 1,331 |
| Injury Causing Death | 1,252 |
| (Quasi) Indecent Assault Causing Death or Injury | 1,138 |
| (Quasi) Forced Intercourse Causing Death or Injury* | 1,018 |
| Robbery in the Scene of Rape ** | 512 |
| Robbery causing Death | 352 |
| Uttering Counterfeited Currencies | 252 |
| Dangerous Driving Causing Death | 218 |
| Counterfeiting of Currencies | 127 |
| Violation of Firearms and Swords Control Act | 109 |
| Abandonment by a Person who is Responsible for Protection Causing Death | 82 |
| (Quasi) Gang Rape causing Injury or Death | 79 |
| Illegal Arrest /Imprisonment causing Death | 63 |
| Violation of Act on Punishment of Organized Crimes and Control of Crime Proceeds | 55 |
| Violation of Special Act on Narcotics | 31 |
| Violation of Explosives Control Act | 17 |
| Abduction for Ransoms | 11 |
| Violation of the Concerning Special Provisions for the Narcotics and Psychotropic Control Act | 10 |
| Asking Ransoms by Abductors | 6 |
| Other | 45 |

**Source:** The Supreme Court, Saiban-in Saiban No Jissi Jyokyo Ni Tsuite (Seido Shiko-12 Gatsu Matsu 2019) The Present Status of the Kay Judge Trials (since the System started at the end of December 2019), Table 1. http://www.saibanin.courts.go.jp/vcms_lf/r1_12_saibaninsokuhou.pdf.

It is also important to point out that the number of the Lay Judge Trials has been decreasing. Please see **Graph 1**. Please consider that the System started in May 21st of 2009. When this system was introduced, the Supreme

Court and the Ministry of Justice estimated that the number of Lay Judge Trials would be about 2,000 to 3,000 (2% to 3% of all criminal trials). However, the number of cases heard by Lay Judge Trials is about 1,000-1,200 for these few years. The crime rate in Japan has been decreasing quite rapidly since 2002, year by year,[14] which can be one of the reasons for the low number of such trials. Also, the number of Lay Judge Trials has been decreasing because prosecutors have increasingly become very cautious about prosecuting cases before the Lay Judge Trials. I will discuss this more fully later in this paper.

**Graph 1: Decreasing Lay Judge Trials**




**Source:** General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, Graph 4, May 2019.

14. *See* Minister of Justice, White Paper on Crime 2018, *available at* http://hakusyo1.moj.go.jp/en/67/nfm/mokuji.html.

## Changes? Yes. So How Much Has Changed? Other Law Reforms to Install the Lay Judge System – Discovery, Better Defense System and Recording Interrogations

As you can see, the introduction of the Lay Judge System was a big change for criminal procedure in Japan. It can be regarded as Copernican Change, in that it inverted the Japanese approach to criminal procedure. The introduction of the Lay Judge System required many reforms to the country's Criminal Justice System.

First of all, criminal trials had to be transformed into much more speedy and concentrated proceedings, otherwise lay people could not participate. Before the introduction of the Lay Judge System, the scheduling of court dates or criminal trials was described as "dentist appointment style" (歯科医方式); Shikai-Houshiki), usually one date per case per month, which much prolonged the processing of criminal trials. Whereas a criminal trial with lay participation must be heard daily until the court session can be completed—which is a much shorter time period. In order to speed up the conclusion of trials, the evidence and issues must be arranged and trial plans must be worked out prior to the start of the trial.

In May 2004, the Code of Criminal Procedure (刑事訴訟法: hereinafter CCP) was amended to introduce the Pretrial Conference Procedure[15] (公判前整理手続), which was, in turn, enacted November 2005 with the aim of arranging the evidence and points of dispute for a case prior to the start of the trial. When the cases are put into pretrial arrangement proceedings or inter-trial arrangement proceedings, public prosecutors are obliged to disclose evidence to a certain extent. All lay judge trial cases have to go through the Pretrial Conference Procedure, and also if a non-lay judge case has complicated points of disputes and evidences, that case can also be put through the Pretrial Conference Procedure if the court decides to do so. Before this amendment, there was almost no discovery phase in cases, therefore, this reform levelled the playing field for defense lawyers and their clients,[16] although it was not still full discovery as it is known

15. Code of Criminal Procedure 321-2〜.

16. Grant-in-Aid for Scientific Research (B) "Comprehensive Analysis of the Expansion and the Advancement of Lawyering in Criminal Fields" (Leading Researcher: Setsuo Miyazawa) conducted interviewed and surveys for lawyers who have zealously defended criminal cases. In that interview, we have found that lawyers have evaluated the Pretrial Conference Procedure especially positively, which has given them more access to the evidences prior to the trial. *See* Mari Hirayama "Amendments of the Code of Criminal Procedure in 2004 and 2016 and the Criminal Justice System Reform in Japan: Lawyers' Evaluations of the Impacts of Those Reforms",

in other countries' courts.[17]

The CCP amendment of 2004 introduced another important change: the introduction of the Court Appointed-Defense Council for suspects (被疑者国選弁護制度). In Japan, there is no public defender system like the one in the U.S. We, however, have had the court-appointed lawyer system. The Constitution of Japan (日本国憲法) Article 37 provides:[18]

> 1. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.
> 2. He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.
> 3. At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

Here, the term "the accused" has been interpreted as "defendant," and previously suspects had the constitutional right for court-appointed lawyers only after they are prosecuted. So until quite recently, under the Constitution, the court (State) did not have to provide lawyers for suspects. If suspects couldn't afford lawyers, they had to ask for legal assistance from the Legal Aid Association (法律扶助協会), which a general incorporated foundation. Indigent suspects in need of legal aid had to rely heavily on the efforts and support from local Bar Associations. The Final Report submitted by the JSRC also stressed the importance of the upgrading and expanding the legal defense system. The CCP reform in 2004 introduced the court-appointed defense lawyer system for suspects. To provide an adequate and thorough defender system, from the suspect stage to defendant stage, is of course critical to the protection of the rights of suspects and/or defendants.[19]

AOYAMA LAW JOURNAL, VOL. 18 (2019), PP.75-92.

17. The CCP reform in 2016 advanced the discovery. After 2016 reform, prosecutors now have to discover a list of evidences they have to the defense side (CCP 316-14 (2)). This is a big step as now the defense can know what evidences the prosecutors have. But still, evidences kept by police are not put on the list.

18. As for the translation of the Constitution of Japan, see http://www.japaneselawtranslation.go.jp/law/detail_main?id=174.

19. Since 2007, the Government has consigned the Court Appointed Defense Lawyer System (国選弁護人制度) both for defendants and suspects to the Japan Legal Aid Center (法テラス) under the Comprehensive Legal Support Act (総合法律支援法). As for the structure and the detail of the Court Appointed defense lawyer System, please see Hou Terasu Hakusyo Heisei 30 nen ban [White Paper on the Japan Legal Aid Center 2018 version], pp. 83-100; also available at https://www.houterasu.o

At the same time, securing enough competent defense lawyers is important to provide defense at the Lay Judge Trials, which operate daily and intensively (連日的開廷・集中審理). Also, in order to avoid false convictions in the Lay Judge Trials, an adequate and competent defense system throughout the criminal procedure is critical, for the suspect and defendant, as well as for the success of the Lay Judge System itself. To secure enough competent criminal defense lawyers was not easy (many of the lawyers do not defend criminal cases regularly), so completing this reform required the system to take some steps.

For instance, in October 2004, the court-assigned lawyers for suspects began to cover crimes punishable with the death penalty, indefinite imprisonment with or without work, and imprisonment with or without work which minimum sentence is one year or longer (CCP 37-2). The targeted crimes were very serious crime, such as homicide, robbery causing injury etc. If suspects cannot afford their own lawyers, only after they are detained, they can use this remedy to get a court-assigned defense lawyer.

On May 21, 2009 (the same date the Lay Judge System started), the court-appointed lawyers system expanded to apply to cases punishable with the death penalty, indefinite imprisonment with or without work and imprisonment with or without work which maximum sentence is more than three years. Then, less-serious crimes, such as larceny, injury etc., were included. The caseload increased by 10 times.

Finally, in June 2018, the court-appointed lawyers system expanded to include all crimes, including groping (most groping cases are punished under the Ordinance of each prefecture). It is an improvement to the system that now we have the court-appointed lawyers for suspects also, which is one of the byproducts of the Lay Judge System. This change is also, along with the Pretrial Conference Procedure, very positively evaluated by many lawyers.[20]

One remaining issue for this system is that the court-appointed lawyers are provided only after suspects are detained. In Japanese Criminal Procedure, when a suspect is arrested, the police have up to 48 hours to send him or her to the prosecution office, and prosecutors have up to 24 hours to decide whether they should request the court to detain the suspect or not. This means, the first 72 hours before prosecutors' requesting the detainment, the suspect is without the counsel of a court-appointed lawyers. Each local bar association tries to cover this "missing" 72 hours by providing lawyers to suspects, however, to retain a court-appointed lawyers for indigent suspects the lawyers need to be applied for right after the suspect is arrested. We all know that having legal counsel at the start of a suspect's detention

r.jp/houterasu_gaiyou/kouhou/kankoubutsu/hakusyo/heisei30nendohakusyo.files/kokusen.pdf.

20. *Supra* note 16, Hirayama.

(arrest stage) is very important and a critical part of any legal defense effort.

The third important change is the introduction of mandatory recording of interrogations. One of the criticisms against Japanese Criminal Procedure is lengthy incarceration before being indicted. As I stated above, the police and the prosecution have up to 72 hours before requesting detainment, and if the court grants the detainment (and most of the time they do), the suspect are detained up to an additional 10 days. After 10 days, if the prosecutors still think they need to detain the suspect, they can ask the court to extend the detainment up to another 10 days. So, after being arrested the suspect can be detained up to 23 days per a crime. And what is worse, the place to detain the suspect is the facility inside the police station, a practice criticized by international human rights organizations such as "Daiyo Kangoku (Substitute Prison)."[21]

## Impacts on Criminal Trials

Next, let's review more direct impacts by the Lay Judge System, which is to say, how the Lay Judge System have impacted the Criminal Trials for the last 10 years. On May 2019, the General Secretariat of the Supreme Court Japan (最高裁事務総局) published the summary report on 10 years of the Lay Judge System, Saiban-in Seido 10 nen no Toukatsu Houkoku Sho [The Summary Report of the 10 years of the Lay Judge System] (hereinafter, *The 10 Years Report*). The 10 Years Report reviewed the impacts on criminal procedure by the Lay Judge System. Let's analyze these changes, and also, how and why.

## Impacts on Conviction Rate

Many of the readers may have heard of the infamously high conviction rate in Japan. So, in Lay Judge Trials, have conviction rate changed? Please see Table 3

21. UN Human Rights Committee has repeatedly recommended to improve this system, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14878.

**Table 3: Conviction Rate in the Lay Judge System and Rate for the Defendants Who Appealed; from May 21, 2009-Dec. 30, 2019**

| No. of Defendants | Guilty | Not Guilty | No. of Defendants Appealed |
|---|---|---|---|
| 12,792* | 12,416 (99.11%) | 112 (0.89%) | 4,587 (36.6%) |

**Source:** The Supreme Court, Saiban-in Saiban No Jissi Jyokyo Ni Tsuite (Seido Shiko-12 Gatsu 2019) [The Present Status of the Kay Judge Trials http://www.saibanin.courts.go.jp/vcms_lf/r1_12_saibaninsokuhou.pdf*]. Number of the referred defendants for this period is 12,792, however, this includes "264" other cases, which are dismissal cases or cases which were transferred to the Family Courts as juvenile cases.

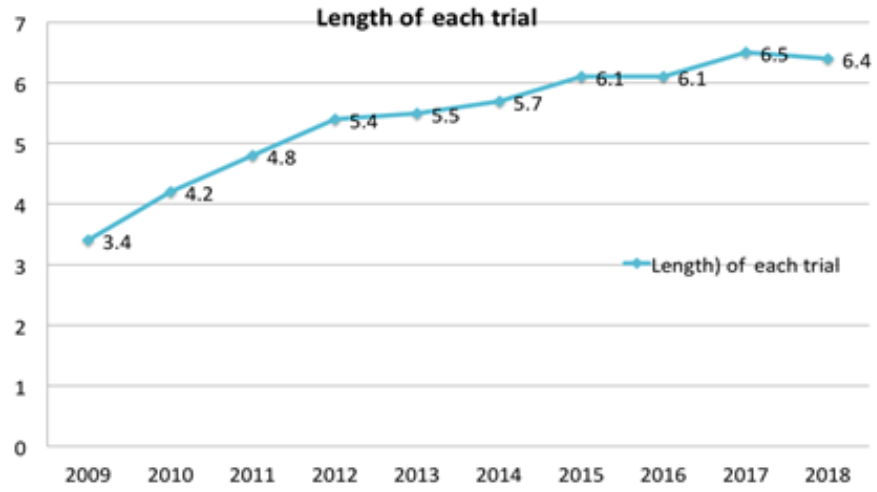
To compare with the rate above, we need to refer to the conviction rate for lay judge triable cases (*see* Table 2) tried by bench trial before the introduction of the System, and that rate was **99.4%** (2006-2008). There is a (very) tiny decline in conviction rate after the introduction of the system, but it is too small to consider as a change.

Also, it is significant to point out, among these 112 defendants who had received "Not Guilty" verdicts, 40 are Methamphetamines (Import for Profit) cases. And if we only focus on this category of crime, not guilty verdicts are around 4.0%, which is much higher than average. It seems, in lay judge trials, it is difficult for prosecutors to prove beyond a reasonable doubt, that defendants have "knowingly" carried Methamphetamines in their luggage. Do lay people more easily believe a defense-side story that "my client didn't know there was Methamphetamines in his bag" than professional judges? This can be interesting topic for further discussion.

## Longer Court Days and More Witnesses

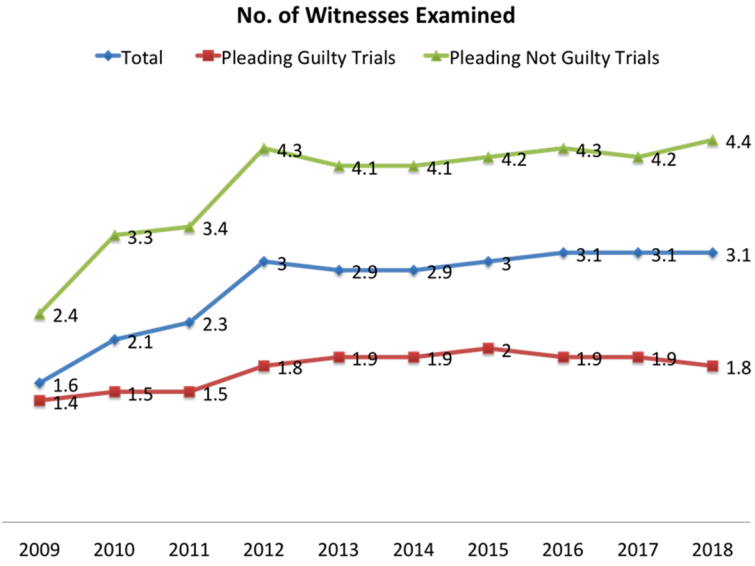
The Lay Judge Trials have become longer and longer. Please see the Graph 2. This means that lay judges must endure longer and longer court days, and must surely relate to the drop in attendance rate (I will discuss this issue later). Longer court case duration is, however, also a good symptom. One of the main reasons why the court days have become longer is, more and more witnesses are examined in Lay Judge Trials.

**Graph 2: Average Length of Each Lay Judge Trial**




**Source:** General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, Graph 14, May 2019.

**Graph 3**

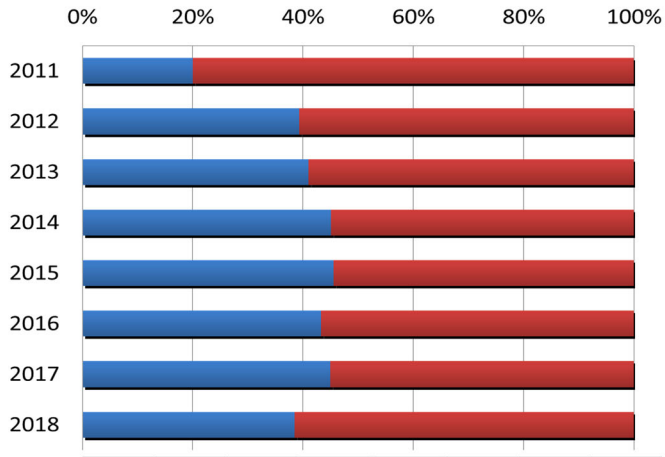



**Source:** General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, Graph 16, May 2019.

**Graph 3** shows the average of the number of the witnesses examined in Lay Judge Trials. It is clear that more and more witnesses are examined in Lay Judge Trials. That is also the case even in uncontested, "pledging guilty cases." (In Japan, pleading guilty cases are also put on criminal trials. Pleading not guilty cases are more complex than the other, however, pleading guilty or not guilty does not give big differences in procedure of trials in most cases.)

This tendency (examining more witnesses) shall be welcome, as the Japanese criminal trials have been criticized as dossier (written statements) centered trials (調書裁判: Chosyo-Saiban) where much of the evidences are dossiers obtained through investigation, and a trial is the place to just confirm the documents. But the Lay Judge Trials are more inclining to oral statements centered approach (口頭主義: Koto Syugi) or direct examination centered approach (直接主義: Chokusetsu Syugi), largely because the court cannot expect lay people to read a large number of documents before the trials, and examining witnesses in front of the court is clearer and easier way to understand the case's central issues. In that sense, the problem in criminal trials in Japan criticized by Prof. Hirano, which I introduced at the very beginning of this paper, can be mitigated to some extent at least in lay judge trials.

**Graph 4: Comparison of the Time to Examine Witness and Dossiers by Prosecutors in Pleading Guilty Cases**




| | 2018 | 2017 | 2016 | 2015 | 2014 | 2013 | 2012 | 2011 |
|---|---|---|---|---|---|---|---|---|
| Time for Witness Examined | 39.4 | 48.8 | 49.1 | 51.7 | 53.3 | 46.8 | 44.1 | 20.8 |
| Time for Dossiers Examined | 62.9 | 59.9 | 64.5 | 61.7 | 64.9 | 67.3 | 68.1 | 83.4 |

**Source:** General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, Graph 17, May 2019.

**Graph 4** shows the comparison between the time to examine witnesses and dossiers (written statements) by prosecutors in pleading guilty trials. The time to examine witnesses increased rapidly from 2012. It is reported that, Mr. Takezaki, Chief Justice of the Supreme Court at the time, made a remark on the examination of evidences in lay judge trials, at the national meeting with the director of each District and High Court on June 9, 2011. According to the newspaper article,[22] his remark at the time was, "Recently even in simple cases, detailed dossiers (such as written statements) are often examined, and many of text of the Judgements have been returned to previous style. It is difficult to say we have achieved oral statements centered approach or direct examination centered approach which are ideal of the Lay Judge System." As you can see from **Graph 4**, this statement by Chief Justice had a large impact. Since 2012, the time to examine witness had increased rapidly. It seems, however, some "backlash" is occurring more recently. As you can see from Graph 4, the time to examine witnesses has been decreasing since 2016, and on the other hand, the time to examine dossiers has been increasing. And also, as I have already stated, the time length for each trial has been becoming longer and longer. If these two tendencies (longer court dates and going back to the old style, namely, "more dossiers" style) continue, the burden on the lay judges will increase. This is one of the issues we need to take measure in order to maintain the good working order of the Lay Judge System.

## Impacts on Sentencing

Also, much interest has been generated by lay impacts on sentencing, as the lay people participate in deciding sentencing, too. *The 10 Years Report* presents sentencing pattern comparison between lay judge trials and bench trials (only professional judge trials) for some crime. They are Homicide, Attempted Homicide, Injury Causing Death, Forced Intercourse (formerly Rape) causing Death or Injury, Indecent Assault causing Injury or Death, Robbery causing Injury, Arson of Inhabited Building, and Methamphetamines (Import for Profit).[23]

Among these crimes, at the introduction of the Lay Judge System, sentence lengths have been increasing greately in sex crime cases. Not all sex crime cases are tried by the Lay Judge Trials. As you can see from the **Table 2**, sex crime cases which result in death or injury of a victim, or forced intercourse committed along with robbery have been tried by the Lay Judge

22. Masahiro Takeda, *Kensyo Saiban-in Seido 10 nen (4)* [*Examining the 10 Years of the Lay Judge System, Series 4*], KOCHI SHIMBUN, Apr. 23, 2019, at 9.

23. The 10 Years Report, pp. 49-56.

Trials. **Graph 5** and **Graph 6** compare the sentencing pattern for sex crime cases among bench trials (from April 2008-March 2012), and those among lay judge trial (Period 1: May 2009-May 2012 and Period 2: June 2012-Dec. 2018).

From comparing the graphs, it is quite clear that sentence lengths in sex crime cases has been increasing after the introduction of the Lay Judge System. So, why sentencing have changed especially in sex crime cases? There may be some explanation as follows:

First of all, the legal professions in Japan have been quite male dominated, and patriarchal culture has been prevailing throughout the society . These factors play a large role in the systemic inclination to believe in "rape-myth," which encourages the courts to focus on victims blaming and to underestimate the psychological trauma of rape. This results include "too-lenient" punishments (compared with that which victims' suffer), which had been binding professional judges, in a way, as precedents.[24]

When we focus the comments or explanations expressed by Presiding Judges at the sentencing phases of Sex Crime Lay Judge Trials, it is interesting many lay judges issue harsher punishments as acceptable practice, and have criticized lenient punishments of the past. Let's refer to some of them:[25]

> ・Rape causing Injury Case (Nagoya District Court, February 26, 2010): 9yrs imprisonment /10yrs asked by the prosecutor (ratio=90%). At the sentencing, the presiding judge commented "the sentences for sexual crimes so far has been too lenient in terms of general sense of people."(Yomiuri Shimbun, March 13, 2010 at 27)
>
> ・Rape at the Scene of Robbery Case (Osaka District Court, March 5, 2010): 7yrs /7yrs asked (100%). At the sentencing, the presiding judge commented "the sentences for sexual crimes so far has been too lenient. The Lay Judge trials should become opportunities to reconsider sentencing for sexual crimes from viewpoints of healthy common sense of general people." (Asahi Shimbun, March 06, 2010 at 34).

And some of lay judges' comments are:

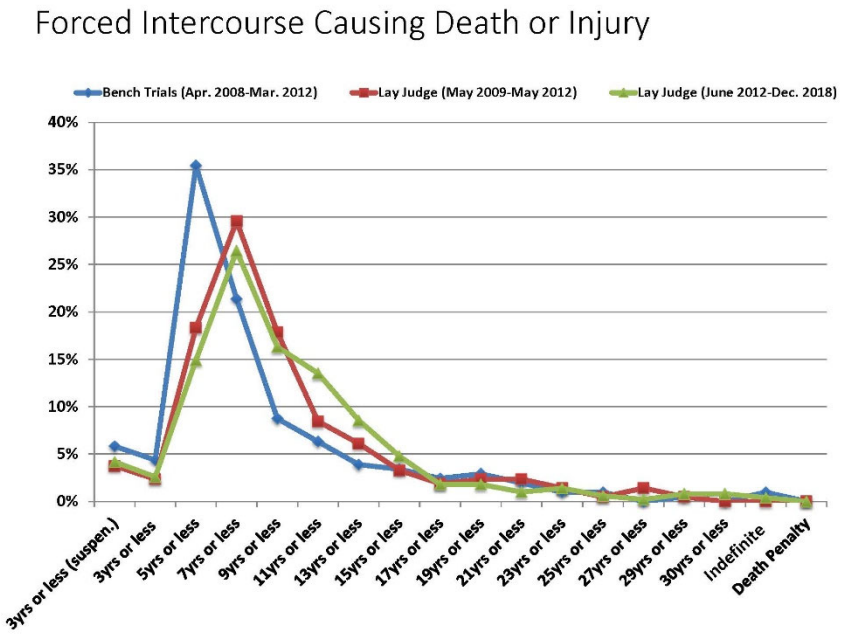
24. Mari Hirayama, *Lay Judge Decisions in Sex Crime Cases: The Most Controversial Area of Saiban-in Trials*, YONSEI LAW JOURNAL, Vol. 3, No. 1 (2012) pp. 128-160.

25. Mari Hirayama, *Saiban-in seido no Eikyo, Kadai, Tenbo- Seido Sikougo 2 Nenkan no Seihanzai Saiban-in Saiban no Kento wo Tsujite Tou* [*Impacts, Issues and Future Prospects of the Lay Judge System-Through Analyzing Sex Crime Lay Judge Trials in First 2 Years*], HOU SYA KAI GAKU [SOCIOLOGY OF LAW], Vol. 79 (2013) pp.85-106.

・Rape at the Scene of Robbery Case (Osaka District Court , March 5 2010): 7yrs / 7yrs asked (100%). A female lay judge commented, "If this weren't lay judge trial, this sentence would not been given."

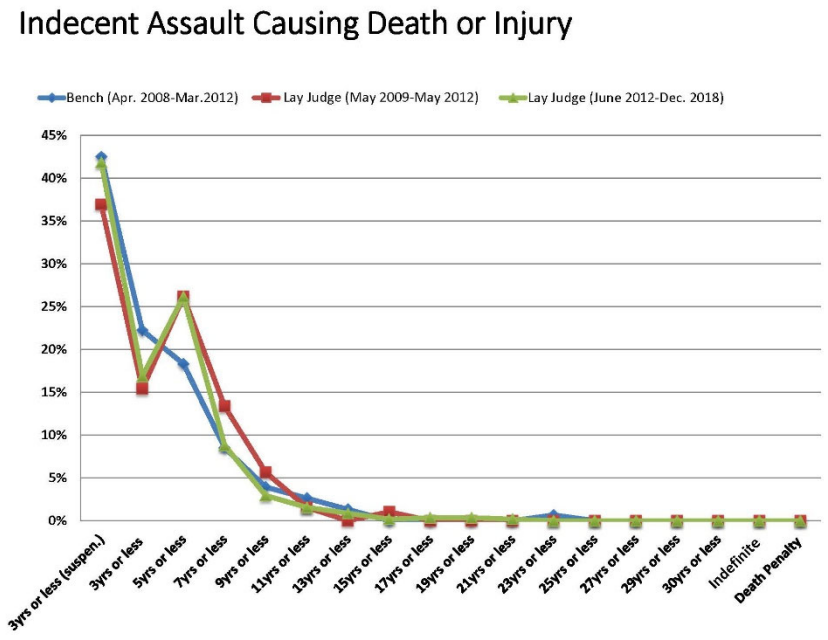
・Indecent Assault Causing Injury Case (Niigata District Court , July 23, 2010) 4yrs /5yrs asked (80%). A male lay judge commented "It is significant to try sex crime by a lay judge trial because it may change opinions and attitude toward sex crimes within a society."

**Graph 5: Sentencing Pattern for Forced Intercourse causing Death or Injury Cases**




**Source:** General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, Table 23-4 (May 2019).

**Graph 6: Sentencing Pattern for Indecent Assault causing Death or Injury Cases**




**Source:** General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, Table 23-5 (May 2019).

And these sentencing changes in sex crime trials have been eventually reflected in legislation. Legislators amended the sex crime provisions of the Penal Code in 2017. Crime of Rape changed the name as the Forced Intercourse, and finally started to include to male as victims. Also, the minimum punishment for the Forced Intercourse increased from 3 years to 5 years imprisonment. Such a big reform including *Actus Reus* (構成要件) of rape was the first reform in 110 years, since the Penal Code was enacted in 1907 (Meiji Era). An increasing awareness of the severity of sex crimes brought by the Lay Judge System gave quite a big impact to push this reform.[26]

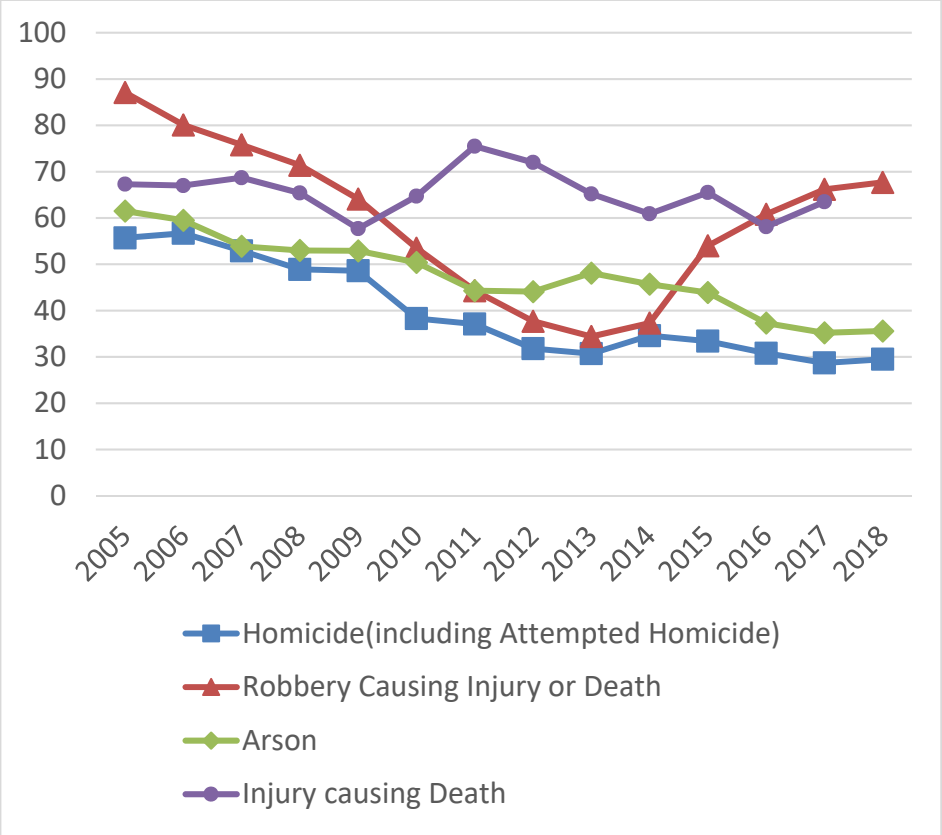
26. Mari Hirayama, *A Future Prospect of Criminal Justice Policy for Sex Crimes in Japan-the Roles of the Lay Judge System There*, *in* CRIME AND JUSTICE IN CONTEMPORARY JAPAN (J. Liu and S. Miyazawa eds.), Springer 2018, at 312.

## Impacts on Indictment Rate?

As we have already seen in Graph 1, the number of the Lay Judge Trials have been decreasing, and one of the reasons for that is decreasing crime rates in Japan. Other reason is a change in indictment rate in lay judge triable crime. As you can see in **Graph 7**, the indictment rates for many of major crime tried by lay judge trials have been decreasing.

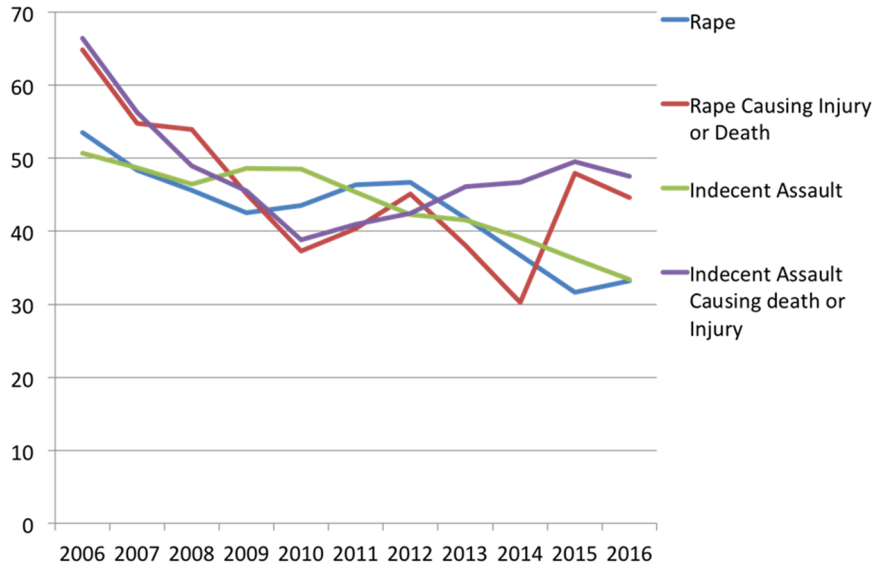
In Japanese Criminal Procedure, prosecutors are the only people who can decide to indict a case or not (CCP Article 247). Prosecutors in Japan have another powerful option: The discretionary power to suspend the indictment even though there is enough suspicion and evidence.

**Graph 7: Change in Indictment Rate in the Lay Judge Trials - Major Crime**




**Source:** Prosecution Statistics 2018, Table 5: Number of Suspects Indicted/Not-Indicted, and Indictment rate

**Graph 8: Change in Indictment Rate in Sex Crime Cases**




**Source:** Annual Report of Judicial Statistics: Vol. 2 Criminal Cases from 2006-2016 (Lawyers Association)

The discretionary power to suspend indictment may have much impacts on the indictment rate. Indictment rate for these major crime has been dropping though Injury causing Death cases are one of the exceptions. The indictment rate for Robbery causing Injury or Death had dropped and then has increased since 2014,, and reasons why for that is not clear at this stage.

So, have prosecutors changed their practice? They have applied "High Estimation in Conviction" standard, which has definitely supported Japan's very high conviction rates in the past and Precise Criminal Justice System in Japan. But it seems like prosecutors have adopted new standards.

Is this because they want to avoid Lay Judge Trials?

Of course prosecutors never admit to this, but it seems they have become more careful in choosing which cases to indict and bring to trial.

As I have conducted research on sex crime in Lay Judge Trials, let me also focus on change in indictment among sex crime (Graph 8). It is quite clear that indictment in Lay Judge triable sex crime Forced Intercourse (former Rape) causing Injury or Death and Indecent Assault causing Injury or Death cases are dropping. One of the big reasons for this may be, prosecutors respecting feelings of victims. Many victims of sex crime do not want their case to be tried by the Lay Judge Trials. They do not want the lay people (they might be their neighbors) to know their victimization. So,

the Lay Judge Trials can be a double edged swords for victims. Most of them may welcome that sentence has been increasing, however, they fear that they may have to testify in front of lay judges.

It is quite interesting to see, indictment in other sex crime (not tried by Lay Judge Trials) are also decreasing. My hypothesis was that while sex crimes tried by the Lay Judge Trials have decreased in number, the indictment rate for sex crime tried by bench trials should have been increasing in number, because prosecutors could have been charging sex crimes at lesser counts, in order to avoid Lay Judge Trials. As long as seen from Graph 8, my hypothesis was wrong. I do not have a clear analysis for this at this stage, so further research is needed.

So, have prosecutors changed their standards in indictment to avoid law Judge Trials? In deciding to indict a case or not, prosecutors have been applying "High Estimation in Conviction"[27] (有罪判決を得られる高度の見込み) which has supported Precision Criminal Justice (精密司法) and the high conviction rate.

On May 15th of 2015, at the House of Councilors Committee on Judicial Affairs, the Director of the Criminal Affairs Bureau (刑事局長) of MOJ explained "Descent had started even before the introduction of the Lay Judge System."[28] It is, however, clear that prosecutors have become even more cautious to select the cases to indict. Lay Judges interpret "beyond a reasonable doubt" as it stated. And Lay Judge may more easily "hesitate" to vote guilty, compared with Professional Judges.[29]

## Equivocal Decision? Lay Judges Seem to Prefer Probation when They Suspend Sentencing

Under Japanese Penal Code, if the sentencing is three years or shorter, or if the fine is 500,000 yen or less, the court can suspend the sentence for 1 year to 5 years (Penal Code Article 25 (1)). In the case where the defendant was not previously sentenced to imprisonment without work or greater punishment the court can place the defendant under the probation. Even though the defendant was previously sentenced to imprisonment without

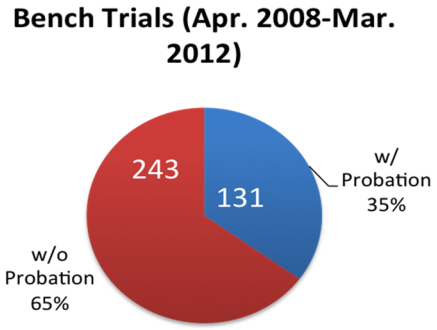
27. Japan Legal Training and Research Institute, "Lectures for Prosecutors 2012 version" (Lawyers Association 2015).

28. Masahiro Takeda, *Analyzing 10 years of the Lay Judge System* Series 1, (Yamagata Shimbun, l. 1, Jan. 23, 2019) at 6.

29. Masahiro Takeda, *Saiban-in Seido 10 nen no Bunseki,* [*Analyzing Ten Years of the Lay Judge System*], *in* 10 YEARS OF THE LAY JUDGE SYSTEM (Nihon Hyouron Sya 2020), p.147. Takeda pointed out, for professional judges, a defendant is "one of them," but for lay judges, a defendant is "only one."

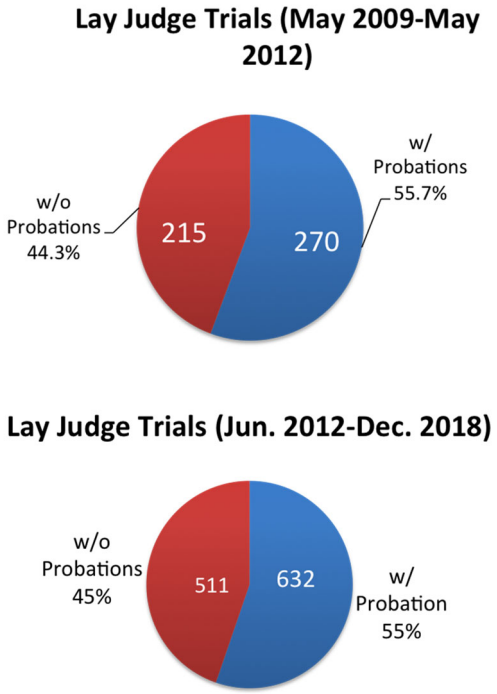
work or greater punishment, but has not subsequently been sentenced to imprisonment without work or a greater punishment within five years from the day on which execution of the former punishment was completed or remitted, the court can place the defendant under probation. Otherwise, placing a defendant under probation is mandatory.[30] What is quite peculiar in lay judge trials are the ratio of placing suspects under probation is high compared with the Bench Trials.[31] Please see Graph 9. It seems lay judges expect a great deal from probation.

**Graph 9: The Ratio of Probation when the Sentencing is Suspended: Bench and Lay Judge**




30. Penal Code Article 25 (2) provide: When a person, who has been sentenced to imprisonment without work or a greater punishment and has been granted suspension of execution of the sentence, is sentenced subsequently to imprisonment with or without work for not more than 1 year and there are circumstances especially favorable to the person, the person may be granted suspension of execution of the sentence as with the persons prescribed for in the preceding paragraph; provided, however, that the same shall not apply to a person who has been placed under probation in accordance with the provisions of paragraph (1) of Article 25-2 and commits a crime again within the period of such probation.

31. Mari Hirayama, "Expectations for Probation in Lay Judge Trials," paper presented at the 3rd World Congress on Probation, Tokyo, Japan, September 14th, 2017.




**Source:** General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, Table 24 (May 2019).

## More Zealous Sentence? When the Lay Judge Trials Assigns Harsher Sentence than Prosecutors Request

Different from the US, there are no sentencing guidelines in Japan. On the other hand, there is a kind of sentencing average (量刑相場), which of course has much to do with precedents, and not many bench trials exceed that average. Also, in relation to punishment (sentence) requested by prosecutors, 80% of the requested sentences (求刑の 8 掛け) had been assigned in most criminal trials. (Of course not exactly 80%, but around that ratio).

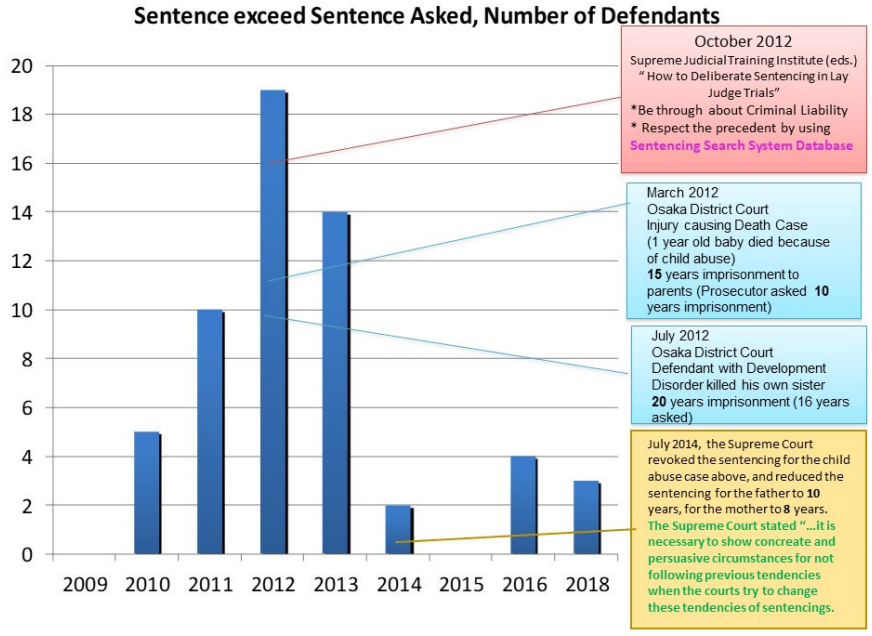
In Lay Judge Trials, however, more extra-harsh sentences are handed down than in bench trials. Some may interpret this tendency as the reflection of broader sense/opinions by lay people regarding sentencing. But there has been some change in sentencing recently.

Please see the **Graph 10**.

In 2012, there were 19 cases where the sentence exceeded what prosecutors requested. Among them, two cases were especially famous for

being quashed by later appellate courts which assigned lighter sentences to the guilty. The media publicized that the Lay Judge Trials were excessively punitive. Then, in October 2012, the Supreme Judicial Training Institute at the Supreme Court published a famous report to warn against excessive sentencing. After that, the tendency for harsh sentences has been rapidly fading out. In 2015, such extra harsh sentencing case was zero. It is of course important to maintain the balance of sentencing among similar cases, and may be cautious to be apart from the sentencing in precedents. One of the purpose of the Lay Judge System ca be, however, to reflect lay people's common sense in sentencing also. If this "pressure" (not to give a defendant harsh punishment) work too hard on lay people, it may result in refraining them from deliberating a case freely. If a mixed panel (professional judges and lay judges) thoroughly discuss the case, and can give reasonable explanation for why they shall give the sentence which exceeds the punishment asked by the prosecutor, the Lay Judges shouldn't be feel too much repressed.

**Graph 10: Number of Defendants who Receive Sentence Longer than Sentence Requested by Prosecutors**




**Source:** Masahiro Takeda, *Kensyo Saiban-in Seido 10 nen (3)*, [*Examining the 10 years of the Lay Judge System*] Series.3, KOCHI SHIMBUN, Mar. 20, 2019, at 12.

## Survival Crisis? More Often to be Quashed?

No one can disagree that the Lay Judge System relies heavily on cooperation from lay people. At the same time, it is also a burden for lay people to decide a defendant's case (and sometimes his or her life afterwards). It is not difficult to imagine that lay judges think over and over, to reach their verdicts and decide sentences. Lay judges may doubt the meaning of their inputs if the verdicts and sentences are reversed or reduced later by appellate courts too easily.

In 2008, a year before the launch of the system, the Legal Training and Research Institute of Japan (LTRIJ) at the Supreme Court stressed the importance of respecting the decisions by the Lay Judge Trials in their annual report. In that report, *Heisei 19-nen Sihou Kenkyu* [*Judicial Research on 2007*], the LTRIJ mentioned that "the decisions by the lay judge trials would be reflections of citizens views, feelings, knowledge and experiences" and "basically, the judgement by the first trials should be respected unless the results are unacceptable by the rule of thumbs and logics, for example the first trials overlooked facts shown by objective evidences." LTRIJ reports do not have any legal bindings over the courts, however, the judges do refer to what the LTRIJ or the Supreme Court think, so this request surely had impact on the judges. This request can be evaluated as respecting lay peoples' decisions, but at the same time, the downside is infringing a defendant's right for three-tiered court system.[32]

Table 4 shows how the quashed sentencing decreased especially the first 3 years of the Lay Judge System. Also, the Supreme Court Decision in 2012 significantly impact sentence quashing. In this Methamphetamines (Import for Profit) case, the defendant was indicted for smuggling Methamphetamines hidden in the can of chocolates. The defendant admitted he knowingly hid fake passports in the can, but he claimed he didn't know there were also Methamphetamines, and so this was pleaded not guilty case. The Lay Judge Trial found the defendant "Not-Guilty," as the court thought the prosecution did not prove beyond a reasonable doubt that the defendant was aware of Methamphetamines in the can (June 22, 2010, Chiba District Court). That was actually the first acquittal lay judge trial case. The prosecutor appealed (note: in Japanese criminal procedure, prosecution can appeal to acquittal verdicts) and the Tokyo High Court reversed the acquittal judgement and found the defendant guilty. The defendant appealed, and then, the Supreme Court's No. 1 Petit Bench, in a 5-0 decision, overturned the High Court's decision,

32. As for such criticism, see Shoji Yazawa, *Saiban-in no Igi wo Jyu Shi shite Ushinau Mono ha Nanika* [*What Will We Lose by Respecting the Significance of the Lay Judge*], West Law Court Precedent Column, No. 68, https://www.westlawjapan.com/column/2009/090720/.

therefore the acquittal verdict was confirmed. In the ruling, the Supreme Court pointed out that if the appellate courts examine the same evidence as the lower court, and reverse its ruling, the appellate court should concretely show that the fact finding in initial trial were irrational in terms of logical consistency and rule of thumps. The Supreme Court then stressed that this should be especially valued as now the Direct Examination Centered Trial / Oral Argument Centered Trials (直接主義・口頭主義) are through in the first trial because of the introduction of the Lay Judge System. (Supreme Court, Judgement, February 13, 2012.)

**Table 4: Sentencing Quashed by the Appellate Courts: Bench and Lay Judge Trials**

| | **1st Trial was Bench Trials** Appellate Trials (2006-2008) | **1st Trial was Lay Judge Trials** Appellate Trials (May 2009-May 2012) | **1st Trial was Lay Judge Trials** Appellate Trials (June 2012-Dec. 2018) |
|---|---|---|---|
| No. of Defendants | 2,455 | 804 | 2,250 |
| Quashed | 431 (17.6%) | 53 (6.6%) | **246 (10.9%)** |

**Source:** General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, (May 2019), at 60, Table 27.

## Any Impacts on the Hostage Justice （人質司法）?

The arrest and detainment of Mr. Carlos Ghosn, a former CEO of the Nissan and Renault in 2018-2019 got many attentions globally. Many global media criticized the Japanese Criminal Justice System as "Hostage Justice," as the lengthy of detainment, and low possibility of bail especially if the defendant deniesguilt.[33] In Japanese Criminal Procedure, the main factor to make a bail difficult the CCP 60-(1)-ii, namely, bail cannot be granted if "there is probable cause to suspect that the accused may conceal or destroy evidence." Quite broad circumstances can be regarded as "probable cause," especially if a defendant is denying the guilt. (Please note that in Japanese Criminal Procedure, a bail can granted only after an accused is being indicted.) Recently, however, the Supreme Court has become stricter about the criteria and

33. For example, Rupert Wingfield-Hayes, *Carlos Ghosn and Japan's "hostage justice" system*, BBC NEWS, Dec. 31, 2019, https://www.bbc.com/news/world-asia-47113189.

requested that the courts have to consider "actual possibility where defendants conceal or destroy evidences." Vague suspicion is not enough. These tendencies slowly have changed slowly the mindsets of the judges[34]. Also, the Lay Judge System play a significant role there. Judges now think, they have to explain to lay judges clearly why the defendants are detained even though they are presumed as innocence. As you can see in Table 5 and Graph 11, there is quite a significant change in detainment policy. Detainments request by prosecutors have been more often rejected by the courts, and bails have been more often granted.

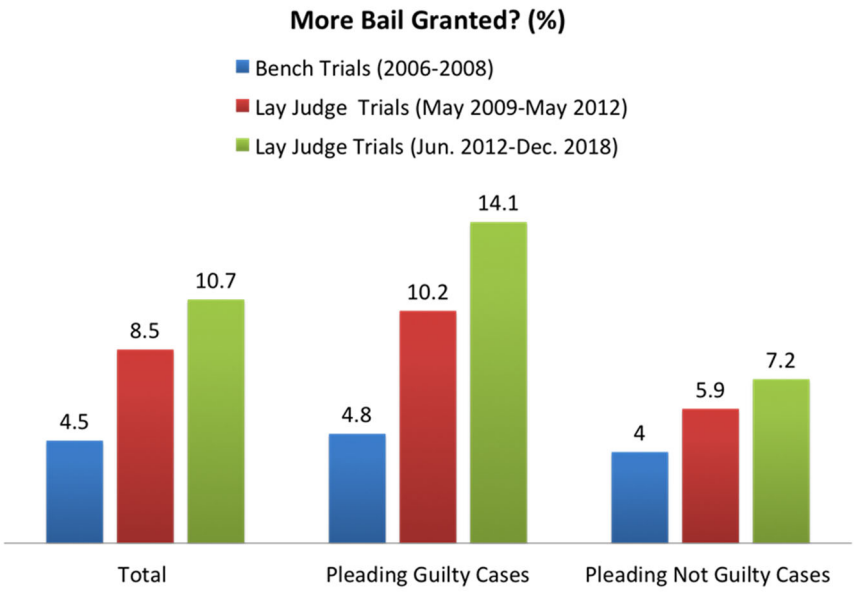
**Table 5: Rejection Rate for Detention of Defendants (District Court)**

| | Detention Requested | Granted | Rejected | Withdrawal | Rejection Rate |
|---|---|---|---|---|---|
| **2000** | 60,383 | 59,927 | 455 | 1 | 0.75% |
| **2001** | 63,849 | 63,336 | 503 | 10 | 0.79% |
| **2002** | 67,033 | 66,558 | 468 | 7 | 0.70% |
| **2003** | 73,872 | 73,434 | 433 | 5 | 0.59% |
| **2004** | 74,837 | 74,214 | 621 | 2 | 0.83% |
| **2005** | 73,755 | 73,172 | 578 | 5 | 0.78% |
| **2006** | 68,511 | 67,664 | 843 | 4 | 1.23% |
| **2007** | 61,609 | 60,510 | 1,096 | 3 | 1.78% |
| **2008** | 56,649 | 55,527 | 1,119 | 3 | 1.98% |
| **2009** | 51,075 | 49,899 | 1,162 | 14 | 2.28% |
| **2010** | 47,456 | 46,189 | 1,264 | 3 | 2.66% |
| **2011** | 45,267 | 43,988 | 1,277 | 2 | 2.82% |
| **2012** | 47,025 | 45,289 | 1,734 | 2 | 3.69% |
| **2013** | 45,028 | 43,268 | 1,758 | 2 | 3.90% |
| **2014** | 44,571 | 42,306 | 2,264 | 1 | 5.08% |
| **2015** | 45,284 | 42,441 | 2,838 | 5 | 6.27% |
| **2016** | 44,799 | 41,773 | 3,025 | 1 | 6.75% |

**Source:** Heisei 16 Nen ni Okeru Keiji JIken no Gaikyo Jyo [Overview of Criminal Cases in 2004, Vol. 1], Table 22, *Hoso Jiho* [*Lawyers Association Journal*], Vol.58, No. 2(2006), p107, Heisei 21 Nen ni Okeru Keiji JIken no Gaikyo Jyo [Overview of Criminal Cases in 2011, Vol. 1], Table 45, *Hoso Jiho* [*Lawyers Association Journal*], Vol.63, No. 2(2011), p.73, Heisei 28 Nen ni Okeru Keiji JIken no Gaikyo Jyo [Overview of Criminal Cases in 2016, Vol. 1], Table 44, *Hoso Jiho* [*Lawyers Association Journal*], Vol.70, No. 2(2016).

34. Akira Goto, *Saiban-in Seido ga Motarashita Mono* [*What Brought by the Lay Judge System*], HOURITSU JIHO, Vol. 90, No. 12 (2018), at 116.

**Graph 11: Granted Bail Rate in Bench Trials and Lay Judge Trials**




**Source:** General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, Table 29 (May 2019).

## Difficult Issues of the Lay Judge System, Some Old and Some New

The main characters in this system are of course the lay judges. As I have already stated, at first the public did not welcome the Lay Judge System. It is not difficult to imagine that the public saw the obligation and the work as burden on ordinary people. But when the Lay Judge System actually started, and cases were being heard, people cooperated well enough when they were summoned for the Lay Judge Trail selection procedure. That may have something to do with the personality of the Japanese themselves, which, among other things, is to be obedient to authority. Once the Lay Judge System started, the people cooperate with the system simply because that obligation is asked of them by the government.

As explained in Table 1, lay judges are selected randomly from the voters list (the Saiban in Act 13). In Japan, the minimum age to vote had been 20 since 1945 (after the World War II), however, the Public Officers Election Act (公職選挙法) was reformedin 2015, and the minimum age to vote changed into 18, since 2016. The minimum age to serve as a lay judge and a member of the Prosecution Review Committee, however, stay as 20

(Supplement Article 10 of the Act). There may be several reasons behind that, however, the government also cast and expect a certain "maturity and experience" in people to become lay judges.

**Table 6: Attendance Rate for the Lay Judge Selection Procedure**

| | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
|---|---|---|---|---|---|---|---|---|---|---|
| A | 40.3 | 38.3 | 33.5 | 30.7 | 28.5 | 26.7 | 24.5 | 23.7 | 22.6 | 22.7 |
| B | 83.9 | 80.6 | 78.3 | 76.1 | 74.0 | 71.4 | 67.5 | 64.8 | 63.9 | 67.5 |

A= Lay Judges Candidates who attended the selection procedure / Lay Judges Candidates who are on the candidates list of that year

B= Lay Judges Candidates who attended the selection procedure / Lay Judges Candidates who were asked to attend the selection procedure

**Source:** General Secretariat of the Supreme Court Japan , The Summary Report of the 10 years of the Lay Judge System, Table 5 (May 2019).

**Table 6** shows change in attendance rate for the Lay Judge Selection Procedure. It seems, more and more people just do not show up. This may have much to do with longer court dates as shown in Graph 2. The longer court dates make the pubic reluctant to corporate.

We also need to blame the strict and vague confidential agreement they have to obey. Different from the Jury System in the U.S., the lay judges have to be under gag order for their lifetime. And what is worse, the line marking what they can and cannot talk about is not clear. The Saiban-in Act Articleprovides as follow;

Article 108

(1) Where a saiban-in or alternate saiban-in has divulged Confidential Information in Deliberations or other confidential information which they came to know in connection with their duties, such person is punished by imprisonment for up to six months or a fine of up to 500,000 yen.

(2) The preceding paragraph applies to cases where a person who has served as a saiban-in or alternate saiban-in falls under any of the following items:

(i) if they have divulged confidential information which they came to know in connection with their duties (excluding Confidential Information in Deliberations).
(ii) if they have divulged the opinions of judges or saiban-in or their number, which are classified as Confidential Information in Deliberations, at deliberations conducted by the Professional Judges and the saiban-in or deliberations conducted only by the Professional Judges that the saiban-in are permitted to observe.
(iii) if they have divulged Confidential Information in Deliberations (excluding those set forth in the preceding item) for the purpose of obtaining property profits or other profits.

Banning disclosureof confidential information they become to know in connection with their duties is reasonable, as to do so is very important in order to protect the privacy of defendants, victims, and witnesses. Also, the private information of the lay judges should be protected. On the other hand, " Confidential Information in Deliberations"is too broad and vague. The ex-lay judges cannot mention how many of the mixed panel support the verdict or the sentence (remember, the Lay Judge System does not apply unanimous rule). Or ex-lay judges even cannot express their own opinion, or whether they support the result of a trial. It seems the courts themselves do not have a clear line marking what can be talked about and what cannot. At some press conferences after sentencing, when some ex-lay judges have tried to answer questions from the press, court staff tried to stop them from answering by saying "It can be breach of the gag order." However the court staff never explain how and why such an answer would breach the gag order. A vague but strict gag order effectively makes many of the ex-lay judges unable to speak of their experience, which prevents current lay judges from learning from their valuable experience. No single lay judge or ex-lay judge has breached this obligation so far, for these 10 years. But if ex-lay judge commits this crime, and if that case is indicted and comes to a trial, the court then would have to interpret the Article 108 and decide what ex-lay judges can and cannot talk about. That will be an important issue for the professional judges to take up and consider.

Next, let's look at what kind of population have become lay judges. Please see **Graph 12**. There are some imbalance, between, National Census. It is clear that more "Otsutome" (salaried employee) have become lay judges. Otsutome people are more men than women, and they work at the larger and more stable companies which can give them paid holidays and who do not worry about their being absent from the work while serving as lay judges.

On the other hand, fewer housewives and househusbands have been selected to become lay judges. They just do not show up the selection procedure, or they may be often exempted because of their duty to care for

family members.

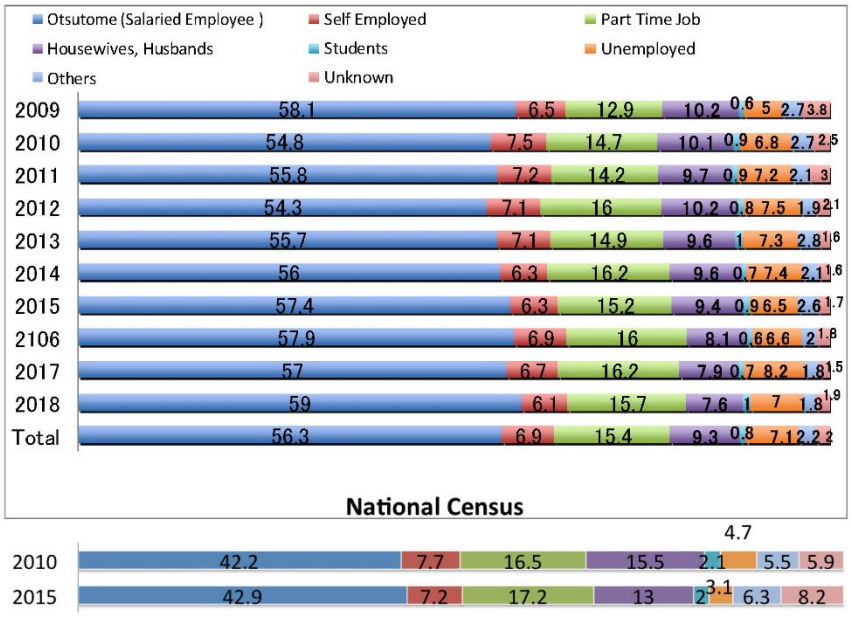
The true intention of the Lay Judge System is to include people from a variety of backgrounds, ages, genders, jobs, etc. If lay judges tend to be selected more from certain group of people, which is a problem as the results of verdicts and the sorts of sentences judges assign may become predictable.

So, what are the solutions? Those who are not showing up the selection process, even though they have no reasonable reason to do so, can be imposed with a noncriminal fine up to 100,000 yen (=1,000 USD) (Saiban-in Act Article 112). One possibility is to apply this sanction strictly. By the way, no one has been given such a fine for these 10 years, even though many people just do not show up for the selection process. The government seems to be reluctant to accuse them and punish them, for the fear that the public will then be even less cooperative. I agree with that.

One solution might be to improve the lay judge work environment for these people who are reluctant to cooperate. Child care support should be offered and improved so as to include housewives and househusbands who are parents.

And also, as I discussed above, getting rid of the strict and vague gag order on ex-lay judges is critical. Serving as a lay judge is a burden and obligation for many of the lay people. If they cannot speak of their feelings, opinions, and experiences even to their family or close friends, it is no wonder they do not want to serve as lay judges. And that is a loss to Japanese society at large. The lay judges' experiences is the rich resource for the improvement of the nation's Justice System.

**Graph 12: Who are the Lay Judges?**




**Source:** Source: General Secretariat of the Supreme Court Japan, *The Summary Report of the 10 years of the Lay Judge System*, Table 6 (May 2019).

## Conclusions

The Lay Judge System has definitely provided important impacts on Criminal Procedure in Japan.

First of all, important model changes of the Criminal Procedure in Japan have been realized in order to introduce the Lay Judge System. As I have discussed above, they are the implementation of the disclosure of the evidences through the pretrial proceedings. Also, the introduction of the court-assigned defender system for suspects and expanding the scope of the crimes applied to, has a great advancement in the Criminal Procedure. And now we have, though in very limited cases, mandatory recording system of whole interrogations. These are really important changes to the Japanese Criminal Procedure.

And a clear impact in sentencing for sex crime cases raised the public awareness for sex crime issues, which played a large role in reforming the Penal Code in 2017. The reform leaves many unsolved issues, however, the public awareness toward victims of sex crime is where the Lay Judge System

played a significant role in the initial reforms of the Penal Code. And as for the warning raised by Prof. Hirano introduced at the very beginning of this paper, the Japanese Criminal Justice can transform from Dossier Centered Trials (調書裁判) to Direct Examination Centered Trial / Oral Argument Centered Trials (直接主義／口頭主義). Japanese Criminal Procedure is often expressed as Precision Justice (精密司法) where the throughout investigation is carried out to find every details of a case. Generally, "precise" is a good phrase, however, criminal trials sometimes fall into be just a façade in this framework. But the Lay Judge Trials may change this framework and fulfill the Trial Centered Approach (公判中心主義).

On the other hand, it is quite troubling to find that indictment rates has been decreasing dramatically. Prosecutors seemed to have become overly cautious in bringing cases before the Lay Judge Trials, which means prosecutors will have more discretions. Some observers may say this is good as fewer people have to face trials, and that results in less stigma imposed on those potential defendants. But if prosecutors have too much discretion to indict or not, or with which crime they indict the cases in such a way as to avoid the Lay Judge Trials, this is a big problem. To indict cases avoiding the Lay Judge Trials can be in opposition to the Trial Centered Approach.

Another concern is that more and more of the public fail to cooperate in the lay judge selection process. And it seems certain groups of the public are more likely to become lay judges, recently. If we really value citizens' viewpoints, feelings, and experiences, the more diverse the lay judge panel becomes, the better for Japan's legal system.

Now the Lay Judge System is 10 years old, and losing its novelty. Everything eventually becomes old and loses its freshness over the years, that is of course inevitable. If we, however, try to maintain the Lay Judge System, and also make the best use of its benefits, we have to change and improve some aspects of the system.

We need to start with listening to voices of ex-lay judges more carefully. Not right after the verdict when they are excited about serving and completing their obligations, but the survey should be done some years after they have finished their service. If they are allowed to look back upon and share their lay judge experience, we may find more interesting voices and opinions, and not the "cookie-cutter" type of opinions such as "generally satisfy their experiences" which are so often reported surveys by the Supreme Court.[35]

35. The Supreme Court take conduct a survey with lay judges every year and asked about their experience. For the question "What is your opinion about serving as a lay judge?", more than 95% of them answer either "Very good experience" or "Good experience" every year.

And in order to vitalize communications and discussions among ex-lay judges and the community, the vague and broad gag order (Saiban-in Act Article 108) must be amended. Ex-lay judges should be able to speak and talk freely about their experiences—with the exception where the privacy of stakeholders (defendant, victims and witnesses etc., and also other lay judges) is at risk.

Also, I would like to point out the significance of the legal education for youth. Amended government course guidelines for school students was announced in 2008. The Lay Judge System has been taught at elementary school (since 2011), junior high school (since 2012) and high school (since 2013). But it seems in many cases, students are simply taught what the court system looks like, and broad idea on what the Lay Judge System is. The next step is to teach students about the law, the courts, and justice. It is very important to teach these young people how society can support victims of crime, how the society can cooperate with rehabilitation and reintegration of offenders, and so on. Studying these issues in school, even at a young age, will be very meaningful, as one day they themselves may become lay judges.

And paying much more attentions to lay participation in trials in other countries, and comparing with them is important. Through comparison, we can learn the pros and cons of our own system. It also means conducting research with scholars and practitioners in other countries is important. And it is valuable to listen to how scholars and practitioners in other countries analyze the Justice System in Japan.[36]

Lastly, I would like to point out some missing pieces. Since the Lay Judge System is now 10 years old, much research and many evaluations of the system have been conducted. There is, however, almost no research on how this system affects two important characters: the victims and the defendants. They are the very people who are affected by the crime, so that they both of course have a great interest in how the Lay Judge Trials are run. But many research reports and media reports are simply about how the system has been seen and evaluated by ex-lay judges or the public. In the JSRC Final Report (2001), it was clearly stated that "the new participation system is introduced not for individual defendant. Rather the system has important significance for the general public or the court system."[37] This statement was made to explain why the JSRC did not propose the right of the defendants to choose the Lay Judge Trial or the bench trials. How the Lay Judge System can contribute to protect rights of defendants was not an

36. One of the excellent books on the Lay Participation in Criminal Justice in Japan by foreign scholars is ERIK HERBER, LAY AND EXPERT CONTRIBUTIONS TO JAPANESE CRIMINAL JUSTICE, (Routledge 2019). Dr. Herber passed away on January 22, 2020. He was not only a great scholar but also a good friend to many people. We will miss him.

37. JSRC, *Final Report*, at 93.

important issue from the beginning. This is a big missing piece. More efforts and research should be made to discuss and analyze how the Lay Judge System can be evaluated in terms of defendants' rights.

So, let me conclude. There are many positive changes made by the Lay Judge System. But still many issues remain, and there also remain some missing pieces. How to face with these issues is the key to how well the Lay Judge System will be operated for next 10 years.